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Attorneys for Defendant Catherine Coley

**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA**

Ryan Cox, individually and on behalf
 of all others similarly situated;

Plaintiff,

v.

CoinMarketCap OpCo, LLC; Binance
 Capital Management Co., Ltd. d/b/a
 Binance and Binance.com; BAM
 Trading Services Inc. d/b/a
 Binance.US; Changpeng Zhao;
 Catherine Coley; Yi He; Ted Lin; and
 Does I-X;

Defendants.

Case No.: 21-cv-08197-PCT-SMB

**REPLY IN SUPPORT OF MOTION
 TO DISMISS FOR LACK OF
 SERVICE**

Defendant Catherine Coley, by and through her undersigned attorneys,
 hereby submits this reply to address arguments in Plaintiff's December 29, 2021 opposition
 ("Opposition"; ECF No. 36) and in further support of her December 15, 2021 motion to
 dismiss the claims against her for lack of service ("Motion"; ECF No. 32).

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff's Opposition sets forth arguments that contravene established rules
 of civil procedure, and each should be rejected. *First*, Plaintiff has failed to meet the
 statutory requirements for effective service by publication under Arizona law. *Second*,

1 even if Ms. Coley had actual notice of this case, that is not sufficient to overcome the plain
 2 requirements of Fed. R. Civ. P. 4 and the statutory requirements for service by publication,
 3 which do not turn on actual notice. *Third*, the Motion is not moot because it raises
 4 dispositive issues that were not considered when the Court subsequently granted Plaintiff's
 5 *ex parte* request to extend the time to serve Ms. Coley. (See ECF Nos. 27, 33.)

6 Accordingly, for the reasons described in the Motion and herein, Ms. Coley
 7 respectfully requests that the Court's September 16, 2021 Order (ECF No. 6) be enforced
 8 such that Ms. Coley be dismissed from this case. Ms. Coley further submits that a stay of
 9 the Court's December 16, 2021 Order (ECF No. 33) would be appropriate, pending
 10 resolution of the dispositive issues raised in the Motion.

11 Argument

12 **A. Plaintiff Has Failed to Meet the Statutory Requirements for Service by** 13 **Publication.**

14 Plaintiff agrees that service by publication is available "only if . . . (i) the
 15 serving party, despite reasonably diligent efforts, has not been able to ascertain the person's
 16 current address; or (ii) the person has intentionally avoided service of process; and
 17 (B) service by publication is the best means practicable in the circumstances for providing
 18 notice to the person of the action's commencement." (Opposition at 2–3 (quoting Ariz. R.
 19 Civ. P. 4.2(f)(1)).) Neither option is applicable to this case. Plaintiff has provided no
 20 evidence that Ms. Coley has avoided service. To the contrary, Plaintiff admits that he hired
 21 a private investigator, Dave Zinn, who uncovered three "possible current addresses" for
 22 Ms. Coley in Puerto Rico, Florida, and North Carolina, as well as a slew of "possible phone
 23 numbers, aliases, and relatives." (Opposition at 3–4; ECF No. 24-1 at 3.) Importantly,
 24 moreover, Plaintiff does not deny that he never attempted service at any of these addresses,
 25 in direct contravention of his own investigator's recommendation to "sub-serve at parents'
 26 address, [Puerto Rico] address, and all social media." (ECF No. 24-1 at 5.) Despite these
 27 undisputed facts proving that Plaintiff had sufficient information to properly serve Ms.
 28 Coley, Plaintiff maintains that he "has not been able to 'ascertain [Ms. Coley's] current

1 address” such that service by publication is available to him. (Opposition at 3.) This
2 attempt to mislead the Court should not be countenanced.

3 Plaintiff next argues that Ms. Coley’s reliance on *Furst v. Mayne*, 2021 WL
4 2517957 (D. Ariz. Jan. 29, 2021) is misguided, even though it establishes a framework for
5 analyzing whether a plaintiff should be entitled to use the procedures for service by
6 publication under Arizona law. In that case, the plaintiffs’ attempts at personal service
7 were far more meaningful: among other things, plaintiffs filed an “affidavit purporting to
8 show that they had served [defendant] by certified mail at her home in California,” and
9 they filed an affidavit that plaintiff “personally served [defendant] at an address in Idaho.”
10 *Id.* at *1. Despite those thorough efforts to locate and serve the defendant at her potential
11 addresses, the court held that “Plaintiffs have not shown that they were unable to ascertain
12 [defendant’s] current address” (which would entitle them to serve by publication), and
13 further wrote that “with reasonably diligent efforts, Plaintiffs could have ascertained
14 [defendant’s] Idaho address and served her there.” *Id.* at *2. For those reasons, as well as
15 the court’s finding that the Arizona Capitol Times was not the “best means practicable to
16 notify [defendant] of this action,” the court determined that the defendant had not been
17 properly served. *Id.* The court decided to extend the time for service only because
18 “[p]laintiffs did not file the suit and then sit on it.” *Id.* at 3. Unlike *Furst*, however, filing
19 this lawsuit and then “sitting on it” is exactly what the Plaintiff did in this case.

20 Plaintiff’s remaining two arguments as to the sufficiency of the purported
21 service by publication can be easily resolved by the plain text of the statute. *First*, Plaintiff
22 argues that he complied with the mailing requirement for service by publication, because
23 the affidavit of publication by the Arizona Capitol Times (ECF No. 28) “does include
24 information that Catherine Coley’s address is unknown.” (Opposition at 4–5.) That is
25 simply not true—the one-page affidavit says nothing about Ms. Coley’s address. (See ECF
26 No. 28.) In any event, the statute plainly states, “If no mailing was made because the
27 serving party did not know the current address of the person being served, the affidavit
28

1 must state that fact.” Ariz. R. Civ. P. 4.2(f)(4)(A). The affidavit makes no such
2 representation.

3 *Second*, Plaintiff argues that the purported service by publication was timely.
4 Not so. “Service is complete 30 days after the summons and statement is first published in
5 all newspapers where publication is required.” Ariz. R. Civ. P. 4.2(f)(2)(D). Even if the
6 30-day clock began to run on the date of first publication, November 19, service would not
7 be effective until December 19, 2021, which exceeds the then-controlling December 13,
8 2021 deadline ordered by the Court. (ECF No. 6.) Thus, Plaintiff either knew or should
9 have known that his attempt at service by publication would not be timely nearly a month
10 before the December 13, 2021 deadline expired, and yet he did nothing to effectuate proper
11 service.

12 **B. Purported Actual Notice Does Not Substitute for Compliance with Rule 4 of the**
13 **Federal Rules of Civil Procedure.**

14 Plaintiff admits that “Publication satisfies due process minimum notice
15 requirements if it is the best means of notice under the circumstances and it is reasonably
16 calculated to apprise the interested parties of the pendency of the action.” (Opposition at
17 5 (quoting *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 73 (Ariz. Ct. App. 2004)).) But
18 rather than arguing that publication in “a self-described ‘niche’ political newspaper” (*see*
19 Motion at 4) is the “best means of notice” to serve Ms. Coley—a non-resident—such that
20 it complies with the minimum requirements of due process, Plaintiff instead contends that
21 service by publication is sufficient to satisfy minimum due process requirements because
22 Ms. Coley purportedly has actual notice of this lawsuit. That argument fails. “Unless there
23 is ‘substantial compliance’ with Rule 4, even actual notice will not provide personal
24 jurisdiction.” *Graham v. United States*, 79 F. App’x 992, 993 (9th Cir. 2003). “While Rule
25 4 is a flexible rule that should be liberally construed so long as a party receives sufficient
26 notice of the complaint, neither actual notice nor simply naming the defendant in the
27 complaint will provide personal jurisdiction absent substantial compliance with its
28 requirements.” *Kinsey v. Dep’t of Veterans Affs.*, 2019 WL 4228478, at *2 (D. Ariz. Sept.

5, 2019) (Brnovich, J.) (internal citations and alterations omitted). For the reasons described herein and in the Motion, Plaintiff has not substantially complied with the time limits set out in Fed. R. Civ. P. 4 and Arizona law, and Plaintiff has no good reason for his failure to timely effectuate service. *See id.* (dismissing complaint for lack of jurisdiction because “Service of Process had to be completed within 90 days of filing under either the Arizona Rules of Civil Procedure, Rule 4.1 and 4, or Federal Rules of Civil Procedure, Rule 4.”). Accordingly, whether or not Ms. Coley had actual notice is irrelevant, because Plaintiff did not substantially comply with the Federal and Arizona rules of civil procedure.

C. The Motion Is Not Moot, Because the Court Did Not Consider the Dispositive Issues Raised by the Motion Prior to Extending the Time to Serve Ms. Coley.

The Court’s September 16, 2021 Order (ECF No. 6) set a deadline for service of December 13, 2021, which Plaintiff admits he missed even under the most permissive reading of the statute for service by publication. (*See* Opposition at 5 (“December 19, 2021 is when service was perfected”).) The September 16 Order also provided that an extension would be granted only if Plaintiff provides “good reason” for his delay by “set[ting] forth the reason why you have not accomplished service.” (ECF No. 6, at 1.) But instead of providing any reasoning at all for his delay, Plaintiff chose to request an extension of time to serve Ms. Coley via a footnote to his December 10, 2021 *ex parte* motion “only out of an abundance of caution.” (ECF No. 27, at 2 n.1.) Plaintiff therefore presented no reasoning, much less “good reason,” for failing to timely serve Ms. Coley.

On December 15, 2021—two days after the deadline to serve Ms. Coley expired, and five days after Plaintiff filed his *ex parte* motion for an extension of time—Ms. Coley filed the Motion, which included a request that “Plaintiff’s Motion for Extension of Time for Service (ECF No. 27) be denied as to Ms. Coley.” (Motion at 11.) But while the Motion was pending, and before it could be fully briefed and considered by the Court, the Court granted Plaintiff’s *ex parte* request for an extension. Because the arguments in the Motion bearing on the propriety of service and Plaintiff’s lack of good reason for an extension were not fully considered by the Court, the Motion is not moot. *See Vasquez-*

1 *Mendoza v. Ryan*, 2013 WL 5446784, at *1 (D. Ariz. Sept. 30, 2013) (Rosenblatt, J.)
 2 (referring case back to magistrate judge for further consideration “[b]ecause it appears that
 3 the issue of exhaustion of remedies was not fully briefed by the parties prior to the issuance
 4 of the Report and Recommendation”). Ms. Coley respectfully submits that a stay of the
 5 Court’s subsequent December 16 Order (ECF No. 33) extending the time to serve
 6 Ms. Coley would be appropriate, pending the resolution of the dispositive issues raised in
 7 the pending Motion. *See Toomey v. Ariz.*, 2021 WL 4710180, at *1 (D. Ariz. Oct. 8, 2021)
 8 (Márquez, J.) (staying order where motion was “not yet fully briefed . . . in order to allow
 9 the Court to thoroughly consider the merits of [the] pending Motions.”).

10 Conclusion

11 For the foregoing reasons, and those set forth in the Motion, the undersigned
 12 respectfully requests that the Court’s September 16 Order (ECF No. 6) be enforced such
 13 that Ms. Coley be dismissed from this case for lack of service. Ms. Coley further submits
 14 that a stay of the Court’s December 16 Order (ECF No. 33) would be appropriate, pending
 15 resolution of the dispositive issues raised in the Motion.

16
 17 January 4, 2022

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Certificate of Service

I hereby certify that on January 4, 2022, I electronically submitted the foregoing document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

January 4, 2022

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